Consolidated S.Ct. Cause No. 79878-8

(Originally No. 80309-9)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT,

Petitioner,

v.

KUSUM L. BATEY,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT KUSUM BATEY AND BRIEF IN RESPONSE TO AMICUS CURIAE WASHINGTON STATE LEGISLATURE

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I. INTRODUCTION

Kusum Batey appealed from the denial of her unemployment benefits claim. She contended that in denying benefits the Employment Security Department ("ESD") relied on a statutory section, RCW 50.20.050, that was unconstitutional. The court below agreed and held that 2003 and 2006 amendments to that statute violated the subject-in-title provision, Art. II, § 19, of the Washington Constitution. The court therefore remanded the case for a new decision under the former version of RCW 50.20.050.

The ESD does not contest that the 2003 legislation's title was invalid; thus, this Court need consider only the 2006 legislation. The title and numerical code references for that 2006 legislation, Engrossed House Bill (EHB) 3278, stated: "AN ACT Relating to making adjustments in the unemployment insurance system to enhance benefit and tax equity; reenacting RCW 50.20.050; and creating a new section." This Court should hold that the 2006 legislation violated the subject-in-title provision because the title did not encompass the bill's contents, which were limited to retroactive reenactment of the amendments to RCW 50.20.050.

This brief is submitted for two purposes: (1) to answer the Legislature's Brief Amicus Curiae ("Amicus Br."), in accordance with RAP 10.1(e); and (2) to respond to this Court's order of January 9, 2008

consolidating this case with *Spain v. ESD* and requesting supplemental briefs on the effect of this Court's decision in *Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006), *cert. denied,* 127 S. Ct. 1382 (2007) for resolution of this case.

II. ARGUMENT

Amicus interprets the limiting prepositional phrase in EHB 3278's title – "to enhance benefit and tax equity" – to mean "changing taxes/benefits in a way the legislature believes is equitable," Amicus Br., p. 4. Amicus then argues that greater equity refers to "a better balance between taxes and benefits." *Id.* p. 5. That interpretation assumes away any meaningful content for the phrase and is inconsistent with common usage in public policy debates, dictionary definitions, and the way a lay person quickly reading the title would interpret it. This Court should therefore reject the legislature's interpretation and affirm the Court of Appeals decision below. Ms. Batey agrees with Amicus that *Fircrest* is of limited precedential value for this case and this Court should repudiate the analytical approach adopted by the four-person *Fircrest* plurality.

A. The phrase "to enhance benefit and tax equity" in the title of EHB 3278 is restrictive and limits the coverage of the bill to matters affecting tax equity among employers and benefit equity among claimants.

As set out in Ms. Batey's previous filings, the court looks at the narrative portion of the title preceding the first semi-colon as the relevant title for subject-in-title analysis. Resp. to Pet. for Rev., pp. 3-4, Reply Br. to Ct. of App., pp. 15-16. That narrative title -- AN ACT Relating to making adjustments in the unemployment insurance system to enhance benefit and tax equity -- does not receive a liberal interpretation, because the phrase "to enhance benefit and tax equity" is a restrictive one. Resp. to Pet. for Rev., pp. 7-12, Reply Br. to Ct. of App., pp. 8-10.

In the passages just cited, Ms. Batey provided a lengthy review of the usage of the phrases "benefit equity" and "tax equity" in legislative debates and discussions of public benefits and taxation. "Benefit equity" and "tax equity" are used consistently and frequently in public policy debates. Benefits are what claimants receive. Taxes are what employers pay. "Benefit equity" addresses the concern of unfairly excluding certain groups from receiving benefits. "Tax equity" is the similar concern of ensuring that similarly situated groups are subject to equivalent taxes. The phrase "benefit and tax equity" is a combination of those two terms.[1]

[1] Respondent has found no common usage of the term "benefit and tax equity," except as a combination of the two phrases.

Thus, the ordinary and accepted meaning of the phrase refers to efforts to ensure that similarly situated claimants receive similar benefits and similarly situated employers pay similar taxes.

Amicus does not directly challenge Ms. Batey's claim that "benefit equity" and "tax equity" have accepted meanings in public policy debates. Instead, Amicus emphasizes that the "language must be judged by its plain meaning . . . [the one] that a typical reader would attach to the words in the title." Amicus Br., p. 4. Perhaps Amicus implicitly suggests that public policy debates involve a non-ordinary use of words, so the accepted usage of the terms in those debates is therefore not a "plain meaning."

If that is Amicus's concern, Ms. Batey has two responses. First, public policy debates are the stuff of our democracy. While some of the sources cited by Ms. Batey can be viewed as technical sources, such as law reviews, they draw on public policy debates common in the legislatures, and reflected in bill titles.[2] Mainstream newspapers also support Ms. Batey's claim that the phrases have a common and ordinary usage. *See, e.g.,* "One of the themes of the October issue of Working Mother is benefit

[2] In addition to the bill titles cited previously, Resp. to Pet. for Rev. pp. 10-11, recent bills using the terms include: Military Retiree Survivor Benefit Equity Act, S. 935, 110th Cong. (2007); Commuter Benefits Equity Act of 2007, H.R. 1475, 110th Cong. (2007); Border Tax Equity Act of 2007, H.R. 2600, 110th Cong. (2007); Alternative Minimum Tax Equity Act, S. 2432, 110th Cong. (2007); Domestic Partner Health Benefits Equity Act, S. 1360, 109th Cong. (2006); Prescription Drug Benefit Equity Act of 2006, H.R. 5937, 109th Cong. (2006). Each of these titles uses the phrase "benefit equity" or "tax equity" to reflect the ordinary meaning argued by Ms. Batey.

equity: at the 100 Best, benefits are available to everyone-from the top executives to hourly-wage earners. *GlaxoSmithKline Named to Working Mother '100 Best Companies' List.* PR Newswire, September 25, 2007, *available at* http://tinyurl.com/2g3f7x; "'Restoring tax equity to our state was my top priority when I was elected to Congress (in 1988) and I am thrilled to see this injustice corrected,' said Rep. Brian Baird, D-Wash." *House Tax Bill Offers Sales Tax Deduction*, The Columbian (Vancouver, Wash.), Oct. 8, 2004, at A6; "Pierce County has long been an overall donor of transportation taxes, but the Senate plan doesn't provide even minimal tax equity." *Senate Roads Plan Is Highway Robbery; Legislative Transportation Leaders Have A Bold Proposal To Raise The Gas Tax, But Want To Funnel Nearly All The Money To King County*, News Trib. (Tacoma, Wash.), April 6, 2006, at B06.

Second, a lay person unfamiliar with the use of "benefit equity" and "tax equity" in public debates would not interpret the phrases to mean "changing taxes/benefits in a way that the legislature believes is equitable" or achieving "a better balance between taxes and benefits." Amicus Br., pp. 4-5. A lay reader of the title "AN ACT Relating to making adjustments in the unemployment insurance system to enhance benefit and tax equity" would identify these key terms: "adjustments," "enhance," and "benefit and tax equity."

The primary definition of "adjust," the root verb of "adjustment" is "[t]o change as to match or fit; cause to correspond." *The American Heritage Dictionary* 22 (4th ed. 2000); *cf. Washington State Grange v. Locke*, 153 Wn.2d 475,496, 105 P. 3d 9 (2005) (cites to definitions found in *The American Heritage Dictionary* to determine common and ordinary meaning of words in bill title). The term "adjustments" would imply to such a person minor, uncontroversial changes, as opposed to a complete elimination of the Commissioner's discretion in evaluating good cause, and serious restriction of the grounds on which benefits can be provided.

In addition, the standard dictionary definition of "enhance" is "[t]o make greater, as in value, beauty, or effectiveness; augment." *The American Heritage at* 593. Would not this person also be likely to think a bill that "*enhances* benefit and tax equity" would *increase* something, most likely by providing additional benefits?

Amicus follows the lead of the ESD in arguing that the phrase "to enhance benefit and tax equity" has no practical meaning. Amicus argues that the term "enhance" must be read as "change" in order to avoid second guessing the legislature's value judgments. This argument suffers from two defects.

First, it ignores the standard dictionary definition of "enhance" quoted above. "Enhance" and "change" are not synonyms. "Change" means to

"cause to be different; alter." *Id.* at 310. The change could be anything, good or bad, less or more. Second, the impetus to avoid second guessing the legislature's value judgments arises only because amicus ignores the remaining language in the phrase. No second guessing is required, if the Court gives *each* of the words in the title its ordinary meaning.

The legislature's argument that "equitable" refers to the "balance between taxes and benefits," Amicus Br., p. 5, lines 2-3, presents two problems. First, it is conceptually odd to speak of the *balance* between benefits and taxes. Benefits are dependent on taxes in an unemployment compensation system financed by an experience-rated payroll tax on employers that increases as more workers claim benefits. As benefits go up, so do taxes, and vice versa. Thus, policymaking in this area is not a matter of balancing the two, but of finding a comfortable level for both.

Second, a writer discussing the problem of tax and benefit levels might say "to achieve better tax and benefit levels," or, in an era that disfavors taxes, perhaps "to reduce tax levels," but not "to enhance benefit and tax equity." Using "enhance benefit and tax equity," the title language of EHB 3278, to express either tax levels or "balance between taxes and benefits" makes too little sense to qualify as an ordinary meaning of the language. For that reason, Amicus's argument must be rejected.

B. The 2006 legislation demonstrates why it is important for this Court to follow the traditional test for legislative compliance with Art. II, § 19 in order to avoid misleading the public.

The voluntary quit amendments enacted in 2003[3] were both significant to and controversial among claimants for unemployment compensation benefits and their employers, as demonstrated by the litigation those amendments have spawned.[4] EHB 3278, the 2006 bill that attempted to cure the subject-in-title problem with the 2003 legislation by retroactively reenacting RCW 50.20.050, was potentially of interest to many ordinary citizens and the people acting to protect their interests. By enacting a bill with a narrow title that did not reflect the contents of the bill, the legislature impaired the ability of both legislators and citizens to monitor pending legislation and make their views known.

As the Amicus Brief notes, p. 10, this Court must determine whether the title of EHB 3278 violated Art. II, § 19, by comparing the title to the contents of the bill. Amicus argues that under the enrolled bill doctrine this Court may not consider the legislative history of the bill in determining whether the title encompasses the contents of the bill. *Id.*

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[3] For brevity the phrase "the 2003 amendments" will refer here to the revisions to the voluntary quit provisions of the Employment Security Act that were enacted in 2003 to be effective for claims filed after January 4, 2004. They were originally enacted as Laws of 2003, 2d Spec. Sess., ch. 4, § 1 (enacting 2ESB 6097).

[4] In addition to the cases consolidated for this appeal, see *Gaines v. State, Employment Sec. Dept.*, 140 Wn. App. 791, 166 P.3d 1257 (2007), *Grater v. Employment Sec. Dept.*, 137 Wn. App. 1013 (2007), *Starr v. Employment Security Dept.*, 130 Wn. App. 541, 123 P. 3d 513 (2005), *rev. denied*, 157 Wn.2d 1019 (2006).

Amicus seriously overstates the scope of the enrolled bill doctrine. The Washington courts adopted that well-established doctrine in a line of cases challenging Washington statutes on the ground that the "method, the procedure, the means or the manner by which [the bill] was passed in the houses of the legislature" violated a provision of our state Constitution, such as Art. II, §§32, 36-38. *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 841, 232 P.2d. 833 (1951) (affidavit not considered to demonstrate that bill was amended in manner that changed its scope and object in violation of §38); *accord Citizens Counsel Against Crime v. Bjork,* 84 Wn.2d 891, 897-98 n. 1, 529 P.2d 1072 (1975) (collecting cases); *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201 (1893) (courts will not consider legislative house journals to determine whether legislature disregarded mandatory provisions of constitution concerning legislative procedure); s*ee generally* 1A Norman J. Singer, Statutes and Statutory Construction, Ch. 15, esp. §5.2-3 (6th ed., 2002).

This Court has referred to the "enrolled bill doctrine" in only three subject-in-title cases. These three cases stand for the proposition that "the enrolled bill doctrine forbids [the court] from inquiring into whether the Legislature would actually have been misled by an amendment that changes the text but not the title of a bill." *Washington State Grange v. Locke*, 153 Wn.2d 475, 495 n. 11, 105 P.3d 9 (2005); a*ccord Brower v.*

State, 137 Wn.2d 44, 71, 969 P.2d 42 (1998); *State ex rel. Washington Toll Bridge Authority v. Yelle*, 61 Wn.2d 28, 33, 277 P.2d 466 (1962).

These cases do not apply to Ms. Batey's claim. Here, the question is not whether the legislature was actually misled by the title. That possibility is not the basis for Ms. Batey's claim. Nor is the question whether a title is invalid because it *also* contains a reference to additional material deleted from the bill, where the narrative portion is concededly congruent with the contents of the bill. Rather, the question is whether the narrative portion of the title itself encompasses the contents of the bill. In this case, it does not.

This Court has never held that the evolution and amendment of a bill during the legislative process is irrelevant for purposes other than determining whether the legislature was actually misled by the title. Ms. Batey suggests that considering that information for other purposes is fully appropriate and does not tread on the Legislature's prerogatives.

Such appropriate purposes would include, first, deciding *what test to use* for subject-in-title purposes, a classically judicial activity. This Court could properly consult legislative history to identify the ways in which the purposes of Art. II, § 19, can be undermined by logrolling, and what test for defining the title will best further the purposes of the Washington State Constitution. Second, this Court may also consult the legislative history to

illustrate how the words in the bill's title are commonly used, by looking at how legislators used them in debates, or in the contents of the bill (as opposed to consulting special definitions in the bill, an interpretive method that was rejected in *Washington State Grange*, 153 Wn.2d at 495). Finally, this Court may properly consult legislative history to determine whether the bill title would mislead those affected by the bill.

Indeed, this Court has in past cases used legislative history in exactly these ways. *See, e.g. Washington State Grange*, 153 Wn.2d 475; *Patrice v. Murphy,* 136 Wn.2d 845, 854, 966 P. 2d 1271 (1998). In *Washington State Grange*, this Court referred to legislative debates for guidance on the common usage of terms used in the title:

> While we cannot glean the thinking of the entire legislature from the comments of a few members, it is interesting to note that the term "qualifying primary" was not commonly used among the legislators during debate to refer to the top two system.

153 Wn.2d at 496. Similarly, in *Patrice* this Court reviewed the legislative history of the bill in question and held that "the last minute 'logrolling' of House Bill 421's provisions to Senate Bill 4155 resulted in a bill containing a subject at odds with its title." 136 Wn.2d at 854.

As these cases suggest, for purposes of subject-in-title analysis, it is completely appropriate for this Court to consider how the legislative process works, and the ways in which the public may be misled if the

legislature is not required to affix accurate titles to its bills. The misleading nature of the title to EHB 3278 – the disconnect between the title and the contents of the bill – was amplified in this case, because the bill with that title had originally included only non-controversial and unremarkable content, initially stating the legislature's intentions, and later extending the deadline for the Joint Legislative Task Force on Unemployment Insurance Benefit equity. See Supplemental Brief of Spain, pp. 8-11, incorporated by reference as permitted under RAP 10.1(g)(2).

Not misleading the public is especially important because the legislative process in Washington includes "hoops" in the form of "cut-off" dates that bills must survive to make it through the legislative process.[5] In addition, the Washington House of Representatives prohibits amendment of titles.[6] Thus, late in a legislative session, legislators will predictably be tempted to substitute their pet legislation for the contents of a bill that has already made it past the cut-off dates, and some will no doubt be tempted to play loose with congruence between the title and the new content. The constitutional subject-in-title requirement may be all that protects citizens' ability to track legislation and is fundamental to our democratic process. This Court can properly consider the legislative

[5] http://www.leg.wa.gov/WorkingwithLeg/overview.htm (accessed January 31, 2008)
[6] Kristen L. Fraser, *"Original Acts," "Meager Offspring," And Titles In A Bill's Family Tree: A Legislative Drafter's Perspective On City Of Fircrest v Jensen*, 31 Sea U. L.Rev. 35, 42 (2007)

history of a bill to determine whether the public would likely be misled by the bill's title.

C. *Fircrest v. Jensen* supports Ms. Batey's position that the title to be analyzed is the title of the amending legislation, the relevant title is the narrative portion of the title preceding the first semicolon, and numerical code section references are not part of the title.

This Court in *Fircrest v. Jensen*, 158 Wn.2d 384 (2006), issued three opinions. "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). The justices joining in the lead opinion and the concurring opinion agree only that the title of SHB 3055 satisfied the subject-in-title requirements of Art. II, § 19. Thus, the holding in *Fircrest* is limited to the "narrowest grounds" that the title of SHB 3055 is constitutional.

Five justices[7] in *Fircrest* adhered to the traditional approach to identifying the title of a bill for Art. II, § 19 subject-in-title analysis. As the concurring opinion in *Fircrest* explained, "dozens of cases could be cited in which the court weighed the constitutionality of an amendatory act without recourse to the title of the original act." 158 Wn.2d at 407. That

[7] Owens, Chambers, and Fairhurst, concurring in the result, Sanders and J. Johnson, dissenting.

approach has been followed by the bulk of the decisions in both this Court and the courts of appeals, [8] and was followed by the court below.

The traditional approach to identifying the title has three aspects. First, the court looks at the title of the legislative bill containing the provisions challenged, whether those provisions were enacted in a bill that adopted entirely new legislation, or amended a previous bill. *Id.* Second, the relevant portion of the title is held to be the narrative portion of the bill preceding the first semi-colon. *Id.* at 416. Third, for subject-in-title purposes, the court disregards the numerical code references to statutes being amended that follow the narrative portion of the title. *Id.* at 417.

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[8] The concurring opinion in *Fircrest* cited the Reply Br. of Appellant at 10 n. 11, which stated:

> Cases where the court did not examine the original act's title include, but are not limited to: *Hacker v. Barnes,* 166 Wn. 558, 7 P.2d 607 (1932); *Petroleum Lease Co. v. Huse* , 195 Wn. 254, 80 P.2d 774 (1938); *DeCano v. State*, 7 Wn.2d 613, 110 P.2d 627 (1941); *Olympic Motors v. McCroskey*, 15 Wn.2d 665, 132 P.2d 355 (1942); *State ex rel. Washington Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 200 P.2d 467 (1948); *Gruen v. Tax Comm.*, 35 Wn.2d 1, 211 P.2d 651 (1949); *Wash. State Sch. Dir. Ass'n et al. v. Dept. of Labor and Industries*, 82 Wn.2d 367, 510 P.2d 818 (1973); *Flanders v. Morris*, 88 Wn.2d 183, 558 P.2d 769 (1977); *Wash. Educ. Ass'n v. State*, 97 Wn.2d 899, 652 P.2d 1347 (1982); *Scott v. Cascade Structures*, 100 Wn.2d 537, 673 P.2d 179 (1983); *Daviscourt v. Peistrup*, 40 Wn. App 433, 898 P.2d 1093 (1985); *State Fin. Comm v. O'Brien*, 105 Wn.2d 78, 711 P.2d 993 (1986); *State v. Thome*, 129 Wn.2d 736, 921 P.2d 514 (1996); *Charron v. Miyahara*, 90 Wn. App. 324, 950 P.2d 532 (1998); *Patrice v. Murphy*, 136 Wn.2d 845, 966 P.2d 1271 (1998); *Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998); *State v. Thomas*, 103 Wn. App. 800, 14 P.3d 854 (2001) (examined prior version of the act for other purposes; did not examine the original act's title with regard to the subject-in-title inquiry). *Bennett v. State*, 117 Wn. App. 483, 70 P.3d 147 (2003); *Retired Pub. Emp. Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003).

Fircrest, 158 Wn.2d at 407.

As mandatory authority, *Fircrest* is therefore limited to its narrow holding and reiteration of the traditional test. Any discussion beyond that is not mandatory authority and should not be applied to this case. For example, the four-justice plurality of the Court revived a minor and long-ignored line of cases stemming from *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952). That case appeared to hold that a bill amending earlier legislation satisfies the subject-in-title section, if its contents are within the title of the original legislation. The plurality justified its position on the ground that the concurrence and dissent had not demonstrated why *St. Paul* was harmful and should be overruled. Washington contains two inconsistent lines of cases that do not acknowledge each others' existence. The question then is, necessarily, which analytical approach is most consistent with the language and purposes of Art. II, § 19.

D. The *St. Paul* approach adopted by the *Fircrest* four-justice plurality is inconsistent with the language of Art. II, § 19, is unworkable in practice, and would seriously undermine the value of Art. II, § 19.

The *St. Paul* test revived by the *Fircrest* four-justice plurality has three significant defects. It has no foundation in the language of the constitution; it would be a nightmare to implement in practice; and it would undermine the protection offered by the constitutional requirement.

1. Washington Constitution Art. II, § 19, does not distinguish between bills that are new legislation and bills that amend existing statutes.

Article II, § 19 of the Washington Constitution states "No bill shall embrace more than one subject, and that shall be expressed in the title." The provision makes no distinction between bills containing original legislation and bills amending earlier acts. The *St. Paul* case is a thin reed upon which to erect such a distinction.

The subject-in-title issue in *St. Paul* was peripheral to the main arguments and the opinion devoted merely four paragraphs to it. 40 Wn.2d at 355. The Court's reference to the title of the original bill responded to appellant's argument that the amendment had changed the scope and purpose of the original bill. Challenging "scope and purpose" is a separate constitutional challenge, under Art. II, § 36 which *may* necessarily look back to the "original act" – but that is not what is involved in an Art. II, § 19 challenge. The Court made no suggestion that it was breaking new ground in subject-in-title analysis by referring to the original bill. The Court cited to the titles of both the original act, and the disputed amendment, and the two titles have identical, broad language in the narrative preceding the semicolon ("AN ACT relating to revenue and taxation"). The Court relied primarily on a quotation from a 1943 treatise that followed an approach that the Court had explicitly rejected some fifty

years earlier in *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 325-26, 68 P. 957 (1902).[9] The sole case cited as authority in the subject-in-title portion of the opinion, *Klickitat County v. Jenner*, 15 Wn.2d 373, 130 P.2d 880 (1942), was, like *St. Paul,* a taxation case, and it apparently considered the titles of the original act and the amendment, because the appellant argued that that both were misleading. All of these circumstances tell us that the plurality's reliance on *St. Paul* was misplaced, and the concurring and dissenting justices correctly chose to bury it.

2. The *St. Paul* test revived by the *Fircrest* four-justice plurality is unworkable in practice because it requires the legislature and the courts to trace the often complex history of a bill that amends a frequently amended statute.

The *St. Paul/Fircrest* four-justice plurality approach of looking to earlier legislation to determine the relevant title of a bill for subject-in-title analysis is unworkable for three reasons. First, in current sessions of the Washington legislature approximately 4-5,000 bills are introduced, and two-thirds of those bills involve amendments to earlier legislation. *See* Appendix A. Thus, the volume of bills that would be subjected to this

[9] As noted in Kristen L. Fraser, *"Original Acts," "Meager Offspring," And Titles In A Bill's Family Tree: A Legislative Drafter's Perspective On City Of Fircrest v Jensen*, 31 Sea U. L.Rev. 35 (2007), the *Fircrest* plurality miscited the treatise, apparently mistaking the number of the section quoted in *St. Paul* – 1908 – for the year of publication of the treatise.

alternative approach is enormous; so any increase in workload caused by the need to identify the titles of original legislation would be unduly burdensome.

Second, the *St. Paul/Fircrest* four-justice-plurality approach would impose an overwhelming workload on the legislature to ensure that titles comply with constitutional requirements. As the Amicus Brief sets out in detail, pp. 15-19, in this age of statutes, bills often contain amendments to code sections that were enacted at multiple times. Thus, if the original title of legislation is the relevant title for subject-in-title analysis, it may take detailed, complex analysis to identify the original legislation and will often be unclear *which* original title is the relevant one.

Finally, the problems faced by the legislature would also be faced by the courts handling lawsuits with subject-in-title claims, if complex tracing of titles were to become the norm. Although courts typically operate at a more measured pace, this burden would not be trivial.

3. To exempt bills containing amendments from scrutiny of their titles and to require reference back to the original legislation would seriously undermine the purposes of Art. II, § 19.

A constitutional analysis that exempts two-thirds of the bills before the legislature from scrutiny of their current title would undermine the legislature's incentive to comply with the constitutional requirement that

the subject of each bill be contained in its title. In an era of rising concern about citizen disengagement from even the basic task of voting, *cf. In re Coday*, 156 Wn.2d 485, 130 P.3d 809 (2006), much less the more sophisticated task of monitoring the activities of the legislature, such an approach can only exacerbate the problem of cynicism and disengagement.

It seems likely that adoption of the *St. Paul/Fircrest* four-justice plurality approach would result in the legislature's taking less care to ensure that current bill titles accurately reflect the contents of the bill. If so, those citizens who continue to be engaged by the legislative process will find monitoring legislation even more difficult than it already is. As the Amicus Brief notes, p. 14, "the title of the original act is not known to . . . the public, only the title of the current act." The public will lack notice of the contents of legislation, if the title of the bill containing the amendment, as opposed to the original bill, does not express the subject of the bill. *See generally State ex rel. Toll Bridge Auth. v. Yelle,* 32 Wn.2d 13, 24-5, 200 P.2d 467 (1948).

To ensure a vibrant democracy, the legislative process should be accessible to ordinary people. A member of the public should be able to determine the subject of a bill from the title itself without engaging in complex and laborious legal research. That is especially so, because the legislative process moves quickly and often does not give participants in

the process time for legal research before they must decide what position to take on a bill. For these reasons, it is critical that the bill state the subject in its title, even if only generally.

III. CONCLUSION

Contrary to the suggestion of Amicus, the title of EHB 3278 is a restrictive one, and the phrase "to enhance benefit and tax equity" has an ordinary meaning that does not encompass the contents of the bill.

A majority of the justices in *Fircrest* adhered to the traditional subject-in-title analysis followed by the court below. Unlike the *St. Paul* championed by the *Fircrest* four-justice plurality, the traditional approach is consistent with the language of article II, § 19, is workable in practice, and furthers the constitutional purpose of providing notice to legislators and the public. Thus, the traditional approach should be retained.

The Court of Appeals decision below is fully consistent with this Court's precedents and is correct on the merits. This case should be remanded to the Department for a new decision under the pre-2003 statute.

Respectfully submitted this 8th of February, 2008.

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FILED AS ATTACHMENT TO E-MAIL

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APPENDIX A

Number of Bills Introduced in the Washington Legislature, 2005-2008

2007-2008 WA Legislative Session House and Senate Bills	
Total Number of Bills Introduced*	4574
Number of bills with "Amending" in the Bill Title**	2891
Number of bills with "Adding" but not "Amending" in the Bill Title***	901

* Washington State Legislature, Statistical Report, *available at* http://dlr.leg.wa.gov/statistical/ (last visited January 23, 2008).
** Washington State Legislature, Advanced Bill Search *available at* http://search.leg.wa.gov/advanced/3.0/main.asp. Query: (TITLE contains ^\-S) & ((WSL_BLTITLE contains amending)) (last visited January 23, 2008).
*** Washington State Legislature, Advanced Bill Search *available at* http://search.leg.wa.gov/advanced/3.0/main.asp. Query: (TITLE contains ^\-S) & ((WSL_BLTITLE contains adding) & (WSL_BLTITLE contains ^amending)) (last visited January 23, 2008).

2005-2006 WA Legislative Session House and Senate Bills	
Total Number of Bills Introduced	5348
Number of bills with "Amending" in the Bill Title	3097
Number of bills with "Adding" but not "Amending" in the Bill Title	976